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IN THE

Supreme Court of the United States.

October Term, 1949.

No. 317 Misc.

AGNES CATHERINE MARRON, ADMINISTRATRIX OF THE ESTATE OF JOHN ANTHONY MARRON, DECEASED,

Petitioner,

v.

THE ATLANTIC REFINING COMPANY.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE ATLANTIC REFINING COMPANY IN OPPOSITION.

Opinion Below.

The opinion of the United States Court of Appeals for the Third Circuit (Proceedings, p. 5 et seq.; see note below) is reported in 176 Fed. (2d) 313.

Jurisdiction.

The judgment of the Court of Appeals was entered July 12, 1949 (Proceedings, p. 14). A petition for rehear-

NOTE. The record herein comprises:—(1) a typewritten copy of the Proceedings in the court below, marked: "Proceedings in the United States Court of Appeals for the Third Circuit", herein referred to as "Proceedings"; (2) a typewritten copy of the petitioner's appendix to its brief in the court below, marked "Appendix for Appellant", herein referred to as "Appellant's Appendix"; and (3) a copy of the respondent's printed appendix to its brief in the court below, marked "Appendix to Brief for Appellee", herein referred to as "Appellee's Appendix".

ing was denied September 10, 1949 (Proceedings, p. 18). The time for filing a petition for a writ of certiorari was extended by Mr. Justice Burton to January 16, 1950. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Statement.

Petitioner was the plaintiff in an action against respondent to recover damages for the alleged wrongful death of her husband, John A. Marron, a seaman employed by the respondent on the SS. "ATLANTIC REFINER". While that vessel was proceeding up the Atlantic Coast in stormy weather, taking heavy seas over her bow, Marron went to the forecastle head of his own volition, stationed himself at the windlass, and was there struck down by the sea and died from his injuries a few hours later. The time interval from the moment that he reached the windless until he was struck down by the sea was material to the question of whether anything could reasonably have been done by respondent to save him from the position of peril to which he had exposed himself, and was estimated by the master and third mate of the vessel at about half a minute, and by a seaman at from five to seven minutes (Proceedings, pp. 5, 6).

In charging the jury (Appellee's Appendix, pp. 20a, et seq.) the Trial Court emphasized the importance of knowing "how long Marron had been up at that place"; stressed that it was the duty of the defendant to take every reasonable means to rescue Marron from the danger to which he had exposed himself; directed the jury to apply to the facts, as determined by them, the law as he had declared it; concluded his charge by saying (Appellee's Appendix, p. 30a):—

> "When I am through with the answers to those points I will ask that counsel call my attention to anything that I have said to you which they think is wrong, or anything which I have omitted which they want me

> to say to you or think should be said, because in covering a case like this a judge frequently overlooks something, and counsel are here to see that nothing of that sort is omitted;"

and, addressing counsel, said (Appellee's Appendix, p. 32a):—

> "Now, gentlemen, I will be glad to hear from you if there is anything you have."

Petitioner's counsel made no objection to the charge, and requested no further instructions to the jury.

The jury answered "No" (Appellee's Appendix, p. 43a) to the following written interrogatory submitted to them by the Trial Court (Appellee's Appendix, pp. 26a, 43a):—

> "Did the defendant fail to use every reasonable means to get Marron out of the dangerous position in which he was when the wave struck him?"

and accordingly rendered a verdict for the defendant. The plaintiff's motion for a new trial was denied (Appellant's Appendix, p. 66).

Petitioner charges that respondent's counsel, in his summation to the jury, made a statement which was prejudicial to petitioner. The summations of counsel were not taken stenographically. The settlement made by the Trial Court (Appellee's Appendix, p. 47a; Proceedings, p. 9), of what was said by respondent's attorney, reads as follows (*italics supplied*):—

> "I have a distinct recollection that counsel for the defendant, in addressing the jury, said *in substance* that *if* the jury should find for the plaintiff they would, *in effect,* be *accusing* the captain and mate, who were on the bridge at the time of the accident, of being criminally negligent."

Question Presented.

Whether the statement made by respondent's attorney in his summation to the jury at the trial in the District Court was prejudicial error.

Argument.

The Court of Appeals affirmed the judgment of the District Court upon the ground that, although the statement made by respondent's attorney was "improper and should not have been made", it was "incidental", of no "substantial importance", and did not constitute "prejudicial error calling for a reversal of the judgment." *It did not,* as petitioner intimates, rest its affirmance of the judgment upon the ground that objection to the statement had not been duly made by petitioner (Proceedings, pp. 9, 12).

The statement made by respondent's attorney did not make any representation to the jury with respect to either the facts in the case or the law:—it expressed merely the opinion of counsel as to what a verdict for the plaintiff would imply. Since, however, the court below was of the opinion that the statement was "improper and should not have been made", it considered the further question of whether it had affected any substantial rights of the petitioner, and determined that question on its merits, by carefully reviewing the whole record, as it said, and held (Proceedings, pp. 9 and 12; *italics supplied*):—

> "However, *on the whole record* we do not find that the incident constituted prejudicial error calling for a reversal of the judgment. * * * It is apparent that appellant's position on the merits of this question is based on the mistaken premise that objection was duly taken at the time to the remark of the defense attorney. That is not the fact as is seen from the above examination of the occurrence. * * * And we do not see that this is the type of case where we should consider the statement on our own motion. Cf. United States vs. Atkinson, 297 U. S. 157, 160. *Nevertheless,* because the defense statement was unwarranted, *we have gone into it carefully* and as pointed out above we do not find it to have been of any substantial importance.

We find no sound reason for thinking that the minds of the jurors would be so influenced by such incidental statement, '• • • that they would not appraise the evidence objectively and dispassionately'. United States vs. Socony-Vacuum Oil Co., 310 U. S. 150, 230." (The quotation from the case cited appears on page 239 of the report, and not on page 230.)

Harmless error has never been held to be a sufficient ground for the reversal of a judgment. The determining question has always been whether any substantial rights of the parties have been affected; and each case, necessarily, turns on its own facts.

In *Dunlop vs. United States,* 165 U. S. 486, 498, this court said:—

"If every remark made by counsel outside of the testimony were ground for a reversal, comparatively few verdicts would stand • • •."

And in *United States vs. Socony Vacuum Oil Co.,* 310 U. S. 150, 240:—

"But each case necessarily turns on its own facts. And where, as here, the record convinces us that these statements were minor aberrations in a prolonged trial and not cumulative evidence of a proceeding dominated by passion and prejudice, a reversal would not promote the ends of justice."

This court has also held:—

"• • • it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corporation vs. Western Well Works, Inc., et al.,* 261 U. S. 387, 393.

Rule 61 of the Federal Rules of Civil Procedure (Appendix to this brief, p. 1a), promulgated by this court, although technically only a mandate to the district courts, we understand to be a clear expression of the views of this court on harmless error.

Whether any substantial rights of parties have been affected by an unwarranted remark by counsel is a question which, manifestly, we respectfully submit, calls for a review of the whole record of the case. Petitioner now seeks to have your Honorable Court review the whole record in the instant case, and to reach its own conclusion; but as to that, this court has held:—

> "We do not grant a certiorari to review evidence and discuss specific facts." *United States vs. Johnston*, 268 U. S. 220, 227.
>
> "Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it." *General Talking Pictures Corporation vs. Western Electric Co.*, 304 U. S. 175, 178.

The instant case, we respectfully submit, does not involve the settlement of any principle which is of importance to the public as distinguished from that of the parties, nor does it present any conflict of opinion and authority. The law which the Trial Court instructed the jury to apply to the facts in the case was clearly stated by the Trial Court in what was said by the court below (Proceedings, p. 11) to have been "an excellent main charge" to the jury. Petitioner's counsel took no exception to the charge, and made no request for further instructions to the jury when invited by the Trial Court to do so (Statement, p. 3 of this brief). Pertinent, therefore, we respectfully submit, is the observation made by Mr. Justice Holmes in *Graham vs. United States*, 231 U. S. 474, 480, 481:—

> "In the courts of the United States the judge and jury are assumed to be competent to play the parts

that have always belonged to them • • • It would be absurd to upset a verdict upon speculation that a jury did not do their duty and follow the instructions of the court."

Conclusion.

For the reasons stated, we respectfully submit the petition should be denied.

Respectfully submitted,

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Appendix.

Federal Rules of Civil Procedure.

"RULE 61. *Harmless Error.* No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."